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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED,
PLAINTIFF-PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY,
DEFENDANT-RESPONDENT.

BRIEF OF PLAINTIFF-PETITIONER ON THE MERITS ON WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NEW YORK.

ABRAHAM W. FEINBERG,
Counsel for Petitioner.

INDEX

SUBJECT INDEX

Page

Brief of Plaintiff-Petitioner on the Merits 1

I. The Opinions of the Courts Below 1

II. Jurisdiction 2

III. Statement of the Case (Refers to Petition) 2

IV. Specification of Errors 3

V. Argument 3

Point I. The Court of Appeals, having disposed of this case as a matter of law, all questions of negligence, all conflicts of evidence, all facts or inferences of facts most favorable to the plaintiff must be deemed established by the verdict in plaintiff's favor 3

Point II. The Breach of duty owed by defendant's motorman to give decedent timely, adequate warning by whistle or otherwise in accordance with (a) defendant's written rules, and (b) its customary practice, and (c) the exercise of ordinary care and prudence under all the circumstances, constituted such independent concurrent negligence as to contribute to the accident and to justify and support the jury's verdict under the Federal Employers' Liability Act 5

Page

Point III. The doctrine of Chesapeake & Ohio v. Nixon should be limited to cases of clear view and ordinary operation of train and where there is no proof of the violation by the defendant of the established rule or custom or other unusual circumstances which alter the reasons and logic underlying the rule 14

Point IV. Rocco's negligence was "contributory" and "concurrent" but not "primary" within the doctrine of Davis v. Kennedy and Unadilla Valley Ry. v. Caldine 19

Point V. Decedent had a positive duty to inspect and repair during certain hours regardless of late trains; especially dominating was this duty on December 8, 1927, on account of washout conditions. General oral instructions to decedent to inquire before going out on the line, as to location of trains enjoined a general caution, the violation of which might be contributory negligence; but such oral instructions did not constitute a specific precaution, for a specific occasion, the violation of which might constitute an assumption of risk as a matter of law 26

Point VI. Decedent did not assume the risk as a matter of law 29

Conclusion 31

TABLE OF CASES

	Page
Aerkfetz v. Humphreys, 145 U. S. 418	15, 17
Blanchard v. D. L. & W. R. R. Co., 211 N. Y. 79	13, 18
Bradley v. Northwestern R. Co., 44 F. (2d) 683	22, 28
Carfelo v. D. L. & W. R. R. Co., 54 F. (2d) 475	17, 29
Chesapeake & Ohio v. De Atley, 241 U. S. 310	30
Chesapeake v. Dibble 31 Fed. (2) 239	24
Chesapeake & Ohio v. Mihas, 280 U. S. 102	19
Chesapeake & Ohio v. Nixon,	
271 U. S. 218	3, 5, 14, 15, 16, 17, 18, 19, 23, 29
140 Va. 351	14
Chesapeake & Ohio v. Proffitt, 241 U. S. 462	13, 30
Chicago, M. & St. P. v. Kane, 33 F. (2d) 866	11
280 U. S. 588	
Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64	12
Chrystal v. Troy & Boston R. Co., 105 N. Y. 164	18
Connelley v. Pa. R. R., 201 F. 54	15, 16
Davis v. Kennedy, 266 U. S. 147	3, 5, 19, 20
Davis v. P. & R. R. R. Co., 276 F. 187	16
Director General of R. Rs. v. Templin, 268 F. 483	30
Erie R. R. Co. v. Irons, 48 F. (2d) 60	24
Fiero v. New York Central R. Co., 256 N. Y. 446	18
Frese v. Chicago, B. & Q. R. Co., 263 U. S. 1	19, 20, 28
Gardner v. Michigan Central R. Co., 150 U. S. 349	5
Grand Trunk R. Co. v. Ives, 144 U. S. 408	4
Great Northern Ry. Co. v. Wiles, 240 U. S. 444	23
Jamison v. Encarnacion, 281 U. S. 635	25
Kreigh v. Westinghouse, C. K. & Co., 214 U. S. 249	4, 12, 30
McAuliffe v. New York Central R. R., 172 App. Div. 922	13
Miller v. Central R. R. of New Jersey, 58 F. (2d) 635	
53 Sup. Ct. Rep. 18	22, 24, 28, 29

Page

New York Central R. Co. v. Marcone, 281 U. S. 345 .... 5, 30
Norfolk & Western v. Kratzer, 37 F. (2d) 522 ..... 16, 29
O'Brien v. Erie R. R. Co., 210 N. Y. 96 18
Paster v. Pa. R. R. Co., 43 F. (2d) 908 ..... 24, 29
Reynolds v. New York, Ont. & Western,
42 F. (2d) 164 ..... 23, 24, 29
Rocco v. Lehigh Valley R. R. Co., 259 N. Y. 51 .....
231 App. Div. 323 ..... 2, 19, 23
Slocum v. Erie R. Co. 37 F. (2) 43 22
Southern Ry. Co. v. Hylton, 37 F. (2d) 843 22
Toledo, St. Louis R. Co. v. Allen, 276 U. S. 165 17
Unadilla Valley v. Caldine, 278 U. S. 139 ..... 3, 5, 20, 28
Unadilla Valley v. Dibble, 31 F. (2d) 239 .....
280 U. S. 565 ..... 24, 28
Union Pacific v. Hadley, 246 U. S. 330 13
Hadley v. Union Pacific, 246 U. S. 330 25
Wyatt v. New York, Ont. & Western, 45 F. (2d) 705
283 U. S. 829 ..... 17, 29

TABLE OF STATUTES

Page

Federal Employers' Liability Act,
35 Statutes 65, 66 ..... 4, 5, 20, 21, 25

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Counsel for Petitioner.

I.

The Opinions of the Courts Below.

The Trial Court, the Supreme Court of New York, Mr. Justice Joseph D. Senn presiding, sitting at Ithaca, New York, in Tompkins County, denied defendant's motion to set aside the verdict and for new trial and wrote an opinion which is unreported. (R. 247-250).

The Appellate Division, Supreme Court, Third Department, affirmed the judgment for the plaintiff by a divided

court. The majority opinion of Justices Whitmyer, Hinman and Hill for affirmance appears at 257 of the Record and the dissenting opinion of Justice Davis and Presiding Justice Van Kirk appears at P. 260 of the Record; both are reported in 231 Appellate Division 323.

The Court of Appeals reversed the judgment and decision of the lower courts unanimously and dismissed the complaint with an opinion which appears at P. 269-271 of the Record and is reported in 259 N. Y. 51.

The decision of the Court of Appeals sought to be reversed was duly entered in the office of the Clerk of the County of Tompkins on the 16th day of May, 1932 (R. 265-269).

Mr. Justice Cardozo, by an order, granted on August fifteenth, 1932, extended to September 14, 1932, the time within which the Petition for Writ of Certiorari might be filed herein.

The order allowing the Writ was filed in the Supreme Court of the United States on October 17, 1932.

II.

Jurisdiction.

It is believed that the grounds on which the jurisdiction of this Court is invoked have been sufficiently set forth in the Brief in Support of the Petition for Writ of Certiorari. The Writ was granted on October 17, 1932, under File number 37,056 (R. 272).

III.

Statement of the Case.

The case is sufficiently stated in the Petition for the Writ of Certiorari under the heading "II Statement of the Case." In the interest of brevity the statement will not be repeated here but Reference to the facts will be made and repeated (and the pertinent Railroad Rules set out in full) in the body of the Brief only as necessary to a discussion of the questions involved.

IV.

Specification of Errors.

1. The Court of Appeals erred in holding on the authority of *Davis v. Kennedy* (266 U. S. 147), and *Unadilla Valley Railroad v. Caldine* (278 U. S. 139), that violation of the rule of inquiry as to the location of trains, by Rocco, was the primary cause of the accident in the case at bar.

2. The Court of Appeals erred in holding, on the authority of *Chesapeake & Ohio Railroad v. Nixon* (271 U. S. 218), that the duty to look out for trains rested solely on Rocco; and in implying, that the motorman under all the physical conditions here present and under the defendant's rules had no duty to look out for Rocco.

3. The Court of Appeals erred in reversing the judgments of the trial court and the Appellate Division of the Supreme Court, Third Department, based on the jury's verdict that defendant was negligent and that plaintiff's negligence was contributory merely.

ARGUMENT.

POINT I.

The Court of Appeals, having disposed of this case as a matter of law, all questions of negligence, all conflicts of evidence, all facts or inferences of facts MOST FAVORABLE TO THE PLAINTIFF must be deemed established by the verdict in plaintiff's favor.

The Court of Appeals did not consider any specific exceptions raised on the trial but considered only the theories of law applicable as was within its province. The Court of Appeals did not rule upon any question of admissibility of evidence. The Court of Appeals in considering Rocco's

negligence accepted the jury's verdict as establishing that negligence upon him.

Judge O'Brien in his opinion, which is the opinion of the Court, said in the third sentence in the second paragraph of the opinion (R. 270) "His failure to discover this fact constitutes in itself not only the *negligence which the verdict imputes to him*, but also a violation of a rule of the road which had existed for more than seven years, and of which he had knowledge." (Italics ours.)

We believe it follows that if the verdict imputes any negligence to the defendant, which it does, that the negligence must be regarded as established, saving only the question whether such established negligence is sufficient *in law* under the Federal Employers' Liability Act to justify and support the verdict. The facts themselves, and all inferences of fact to be drawn therefrom, most favorable to the plaintiff must be deemed established. The Court has held this proposition in the following cases:

> "The testimony shows, *and*, in deciding a question of this character, the view must be *taken of it most favorable to the plaintiff*." Kreigh v. Westinghouse C. K. & Co., 214 U. S. 249. (Italics ours.)

The question of negligence is itself peculiarly within the jury's province as was said in Grand Trunk R. R. v. Ives, 144 U. S. 408:

> "It is their (jury's) province to note the special circumstances and surroundings of each particular case, and then say *whether the conduct of the parties* in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. *When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury.*" (Italics ours.)

In considering the question of negligence the Court will

not withdraw that question from the jury unless the established facts are such that "all reasonable men must draw the same conclusion from them." *Gardner v. Michigan Central R. Co.*, 150 U. S. 349.

As to the jury's province to draw inferences reference may be made to the opinion of Mr. Justice Stone in *New York Central v. Marcone*, 281 U. S. 345, where he said "But *the inference to be drawn* from this testimony as to the existence of the custom, its purpose, and the reliance which deceased under all the circumstances was entitled to place upon it, *was for the jury.*" (Italics ours)

We do not claim that the application of these principles forecloses this Court from the consideration of the question of whether the evidence is, as a matter of law, sufficient to establish the negligence found by the jury both as to the defendant and as to the plaintiff. That question was properly before the Court of Appeals and we believe properly here. The above point is made at the threshold of the consideration of that problem because we believe that the Court of Appeals in reversing this case upon the authority of Chesapeake & Ohio v. Nixon, Unadilla Valley v. Caldine and Davis v. Kennedy did not take into consideration *all* the facts and inferences found by the jury.

POINT II.

The breach of duty owed by defendant's motorman to give decedent timely, adequate warning by whistle or otherwise in accordance with (a) defendant's written rules, and (b) its customary practice, and (c) the exercise of ordinary care and prudence under all the circumstances, constituted such independent concurrent negligence as to contribute to the accident and to justify and support the jury's verdict under the Federal Employers' Liability Act.

(a). *Motorman's breach of duty in respect to written rules.*

The following rules were put in evidence from defendant's Rule Book (R. 53, 54, 55, 56):

"Page 21 under the title 'Signals', title subject engine and motor whistle signals, page 19."

"The signals prescribed are illustrated by "O" short sound; "—" for longer sounds. The sound of the whistle should be distinct, with intensity and duration proportionate to the distance signal is to be conveyed."

Subdivision D of Rule 14:

"(q) O—O running against current of traffic; when approaching highway crossings immediately after sounding the prescribed whistle signal and approaching curves and other points where the employees may be at work on track or bridges."

Rule 105.

"Both the conductor and engineman are responsible for the safety of the train, the observance of the rules and, under conditions not provided for by the rules, must take every precaution for protection."

Rule 1088, under same sub-heading:

"Road watchmen must carefully examine the track and roadbed and see that they are in safe condition."

Rule 1028, under the heading enginemen:

"Enginemen of engines running light must exercise great care in looking out for motor cars, handcars and trucks and sound the whistle frequently at dangerous places, or where the view of approaching trains are obstructed, to warn the employees using these cars of their approach."

Subdivision D, Rule 14, "(q)".

The applicability of Subdivision D, Rule 14, "(q)" was disputed, defendant claiming through certain witnesses that the rule applied only to double track by virtue of certain "bold-face type", and that the matter before the semi-colon

qualified the whole rule. The plaintiff claimed that the rule meant what it said and was applicable. There was a difference of opinion among defendant's own witnesses. The locomotive engineer and examiner on rules, Mr. Truman, called as an expert by the defendant, on his direct examination testified that the rule applied to single track as well as double track (R. 115), and this witness, Truman, was the man who instructed Rocco as to the oral rule about inquiring for train "line-up" before going out on his section patrol. Other defense witnesses testified to a contrary interpretation. The jury, as judges of credibility and conflicting testimony, evidently believed Mr. Truman on both scores, as they had the undoubted right to do. The applicability of Subdivision D, "(q)" of Rule 14 was established, out of the mouth of defendant's witness by the defendant on his direct examination, *as a fact.*

Neither the Appellate Division nor the Court of Appeals has questioned the authenticity of this fact; on the contrary, the Appellate Division, who had power, under the New York Practice, to review the facts, expressly regarded the fact above stated as established (R. 258).

The verdict established as a fact that the motorman knew about persons having lawful business on the track, which included Rocco, might be in this very curve where the accident happened. Such knowledge is alleged in the complaint (R. 6, 7, fol. 18, 19). The question of such knowledge was submitted to the jury to determine (R. 233). The motorman, Silke, (R. 167) who had been operating on this division about 7 months (R. 175), knew this particular rule (R. 176); he was over three hours late on account of washouts and landslides; he was specifically watching for people on the track at the time of the accident (R. 187, fol. 560). He was operating on a division to which on account of the constant danger of washouts and landslides there was assigned a regular patrol system of inspection by men on slow-moving speeders, of whom Rocco was one. (R. 95, 96).

It is a fair inference from the time of his operation on this division that he knew that there was such an inspector of

the track from Ludlowville to Ithaca. It is a fair inference from the unusual events of that day and the unusual danger which made him over three hours late and from repair work that was being done ahead of him all the way from Auburn to Ithaca and from the fact of high water, high winds, and the water on the track on this particular curve, *that he knew that workmen might be encountered at that very point of danger, the last point of danger before the track left the shoreline of Cayuga Lake.* Even if there had been evidence proferred by the defendant to negative such knowledge, the question would be for the jury, but there was no evidence negativing such knowledge. So, for the purpose of this appeal the knowledge herein referred to upon the engineer's part must be deemed established as a fact.

We come now to the ultimate fact of the defendant's negligence, namely, that the engineer with knowledge of the applicable rule and knowledge of the presence of workmen at the point of danger to his very train on account of the unusual conditions and with knowledge of the extremely dangerous blind curve did not give the whistle warning required by the rule. The established fact is that he did not give the warning for the crossing which was 469 feet south of the point of the accident (R. 25, 26), though there was a sharp conflict as to whether the crossing signal was given. Two witnesses, the only disinterested ones, having testified that no signal was given, the jury's verdict resolves that conflict in plaintiff's favor upon evidence which it was entitled to believe,—that of Stevens, the zoological specimen collector, who was in a remarkably good position to hear a whistle; and that of Testut, the government mail clerk, who was on the train, heard the bell ringing and did not hear the whistle. But the crossing whistle, even had it been given, would not avail to warn Rocco and would not necessarily be a compliance of adequate and timely warning to him engaged in inspection on this very curve over which the waters were washing.

The jury had a right to infer also that the engineer knew

that the road inspector, Rocco, had an afternoon tour of duty.

In respect to this failure to warn Rocco by whistling, in violation of the rule aforesaid, we submit that every essential fact is conclusively established by the jury's verdict based on sufficient evidence. In establishing this fact of negligence on the part of the defendant we are, of course, disassociating all questions of assumption of risk and plaintiff's contributory negligence.

In respect to the plaintiff's railroad rules 105 and 1028, we claim that they confirm and support the binding effect upon the defendant of Rule 14, Subdivision D. The enactment of these rules is obviously intended to close possible loopholes of escape in other rules. They certainly were not intended to provide a *lower* standard of care on the part of the engineer.

(b) *The motorman's breach of duty in respect to defendant's customary practice.*

The three rules, Rule 14, Subdivision D, "(q)", Rule 105 and Rule 1028 read together, show a recognition upon the part of the defendant of the standard of care to be observed in approaching curves where employees may be working on the track or may be on hand cars out of view of approaching trains.

This recognition of the need for a higher standard of care is what confirms and corroborates a custom to warn at a particular point. And even though the rule may not specifically cover that location, the fact that a high standard has been adopted as shown by the rules, a custom in consonance with the general rules, should require very little proof. We do not here cite the rule as a custom but we cite the general principle of the rule as authorizing and showing recognition of a custom which may spring up at any point.

The witness Kish testified (R. 47) that the whistle on southbound trains blew as they came into this curve ever since he had worked there, which was since 1920, some

seven years. The jury could have found a custom from this fact, confirmed as to the specific curve by the same corroborating effect of the rules aforesaid. Justice Whitmyer, in the majority opinion of the Appellate Division (R. 257, fol. 771) accepted this evidence when he said: "This whistle had been sounded in approaching the curve since June 1920" as corroborating the applicability of Subdivision D of Rule 14. Our point is that the jury was justified in finding a custom to blow the whistle at that particular point and so must be presumed to have found the custom as an established fact in the case.

(c) *The motorman's breach of duty in respect to the exercise by him of ordinary care and prudence under all the circumstances.*

It is submitted that if negligence is the failure to do that which a reasonably prudent person would do under all the circumstances, then it follows that entirely independent of rules or customs the defendant's motorman was negligent in failing to adequately warn Rocco under all the circumstances of this case. We have the extraordinary conditions of operation obtaining on the 8th of December, 1927; the many washouts on the Ithaca-Auburn road that day; the consequential fact that the train was over three hours late at the time of the accident. (R. 104). It was not running on any schedule or keeping any time. (R. 104). We have the knowledge, actual or constructive, on the part of the motorman of the patrolling of this very roadbed by Rocco and other employees especially for this condition on every day. (R. 99). We have his knowledge, actual or constructive, that Rocco was to be encountered somewhere in that last seven miles, and that he would be engaged in the very essential operation of inspecting for repairing under the extraordinary conditions of the roadbed on that day. We have his knowledge that the blind curve the last at the head of the lake where the waters were piling up three feet higher than usual (R. 61) and where the rails were wet with the water coming in between the boathouses on the

curve (R. 175). These were not ordinary conditions of operation. They were extraordinary, yet the motorman entered the blind curve at 30 miles an hour (R. 172, 175) a speed not extraordinary in itself but extraordinary considering the operating conditions at that point and on that day.

"*If under the circumstances*, the speed of the train and the failure to give any warning signals, in combination, constituted negligence, the jury was warranted in finding it to have been the proximate cause of the accident." Chicago, M. St. P. R. R. vs. Kane 33 Fed. 2nd 866, at 869 certiorari denied 280 U. S. 588. (Italics ours)

The government employee, Testut, who was offered as a witness by the defendant, testifying on direct examination of his opportunity for seeing ahead said that he had opened the door leading into the front vestibule "when we were going around that curve where those trees were." (R. 203). We quote from his testimony as to why he opened the door:

> "Q. 'Any reason?' "
>
> "A. 'We had had trouble with the tracks and I wanted the door open so I could jump if necessary. We had several occasions.' "

This bit of testimony throws a strong light on whether the motorman was operating the train with due care under the conditions.

Then we have the testimony of the motorman himself (R. 175) who testified that on account of the wet rail at the time and place of the accident he could not stop the train though he immediately applied the emergency brakes until he had reached the crossing (R. 192), a distance of 469 feet. (R. 25, 26)

Let us suppose that there had been a washout in that blind curve,—not at all an improbability on that day and place, but from the motorman's standpoint it should have been a distinct probability, when we consider Testut's direct testimony that he had opened the door when "going around that curve" so he could jump if necessary. He

wasn't looking for collisions. He said "we had several occasions." He was looking for a washout at that very time and place. And let us suppose that Rocco, coming slowly into the blind curve from his end, had arrived at the washout concurrently with the train, and had thus met his death by the train's derailment. Could there then be any doubt, that the motorman's speed on that curve under the conditions that day was negligently excessive? Then the same speed under the same conditions, was not one whit less negligent because it happened that there was no washout there, only Rocco looking for a washout.

It is a fair inference then of fact that the motorman drove his train as one committed to the policy of rushing dangerous spots on a dangerous day rather than to the policy of one using due care under the circumstances. This method of operation, coupled with the motorman's knowledge, actual or constructive, of Rocco's presence, or the likelihood of his presence, in that very dangerous spot because of his important duties that day raised a common law duty to warn Rocco adequately and in time by the simple *means that the engineer had at hand, namely the whistle.*

We quote from Kreigh v. Westinghouse, C. K. & Co., 214 U. S. 249:

> "Where workmen are engaged in a business more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employees, and not to expose them to the danger of being hurt or injured by the use of a dangerous appliance *or unsafe place to work*, where it is only a *matter of using due skill and care to make the place and appliances safe.* There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64." (Italics ours)

The extreme lateness of the train (over 3 hours) which killed Rocco, is a sufficiently important element, standing by itself, to raise the duty to warn by whistle those em-

ployees lawfully on the tracks. Blanchard v. D. L. & W. R. R. 211 N. Y. 79. McAuliffe v. New York C. R. R. 172 Ap. Div. 922.

It is no answer to say that at common law Rocco might have been guilty of contributory negligence. It is no answer to say that under the Federal Employers' Liability Act Rocco assumed the increased risk of this extraordinary method of operation. We quote from Mr. Justice Pitney, writing for this Court, in Chesapeake & Ohio v. Proffett, 241 U. S. 462:

"But if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge or notice on his part. To subject an employee without warning to unusual dangers *not normally incident* to the employment is itself an act of negligence." (Italics ours)

It is of the very essence of this specification that the motorman operated the train, under the unusual and abnormal conditions prevailing that day at that point in a highly reckless, unusual, abnormal and extraordinarily dangerous manner as to speed without warning to Rocco.

The jury's finding of negligence against the defendant on this score is founded on amply sufficient evidence and should not be disturbed or set aside as a matter of law.

And finally we claim that in establishing the negligence of the defendant in respect to the failure of the motorman to sound the whistle adequately to warn Rocco as a proximate cause of his death, the jury were entitled to consider all the grounds above specified *together*. We quote from an opinion of the Court in Union Pacific v. Hadley, 246 U. S. 330,:

"On the question of negligence, the defendant undertook to split up the charge into the items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general

question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct, viewed as a whole, warranted a finding of negligence."

The Court in the above case stated that it would refuse to disturb *any finding* that was *possible on the evidence.*

POINT III.

The doctrine of Chesapeake & Ohio v. Nixon should be limited to cases of clear view and ordinary operation of train and where there is no proof of the violation by the defendant of the established rules or custom or other unusual circumstances which alter the reasons and logic underlying the rule.

Chesapeake & Ohio v. Nixon is based upon two simple, but very general, statements—(1) is that the engineer and fireman owed no duty to the decedent to keep a look out, and as a corollary to that, decedent took the risk; (2) is that the decedent must rely on his own watchfulness, and as corollary to that, that the railroad company was entitled to expect that self-protection from its employees.

Examination of the facts before the Supreme Court of Appeals of Virginia, 140 Va. 351, discloses that there was ample opportunity for vision, as much as 2000 feet, that the day was clear; that the decedent was proceeding away from the train and was hit from the rear by a freight train traveling 25 miles an hour while decedent was on a three-wheeled velocipede traveling at the maximum 8 or 9 miles an hour. The engineer and fireman were not on the lookout and were unaware that an accident had happened. It thus appears that the decedent had ample opportunity for self-protection by merely looking back, when looking would have prevented the accident. There was nothing unusual about the train's operation, or the day, or the straight track, or

the opportunity of vision. There was some wind blowing against the train.

Examination of the facts and opinions in the cases upon which the Nixon case is based shows that the doctrine is founded upon the premise of *ordinary operation* of trains on straight tracks where the track worker has an equal opportunity to avoid the danger through sight or hearing, or cases where the engineman has violated no *rule* or *custom* expressly fixed, a duty to warn by whistle or otherwise.

In Aerkfetz v. Humphreys, 145 U. S. 418, it appeared in the opinion of Mr. Justice Brewer that the tracks were straight; that the plaintiff stood with his back to the approaching cars, without turning to look; that the cars were moving at a slow rate of speed, no greater than customary; that by ordinary attention he could have observed the cars; that he had an abundance of time to avoid the cars; that there was no reason for the engineer to expect that the plaintiff would pay no attention to his own safety, that ordinary attention on the part of the plaintiff to the ordinary business of the yard would have made him aware of the approach of the cars. The Court said:

"It cannot be that, *under these circumstances*, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees, who had, all the time, knowledge of what was to be expected. We see in the facts so disclosed no negligence on the part of the defendants, and if by any means, negligence could be imputed to them, surely the plaintiff, by his negligent inattention, contributed directly to the injury." (Italics ours)

In *Connelley v. Pennsylvania R. R. Co.*, 201 Fed. 54, Court of Appeals, Third Circuit, a track walker was killed by a train being backed into Broad Street, Philadelphia. The train had on the rear platform a brakeman to give warning by shouting or whistling. The brakeman did not see Connelley owing to a cloud of steam enveloping him. Judge Buffington writing for the Court said that track walkers are subject to great risks, that for self-protection they must

assume the risks "so long as the defendant, railroad, used the terminal tracks by running its trains properly thereon *in the usual way.*" (Italics ours)

It appeared that track walkers were sent out in pairs, that decedent's mate called his attention to the steam and advised him to move away, and that Connelley failed to heed the warning, which was what cost him his life.

In *Davis v. Philadelphia & R. R. R.*, 276 Fed. 187, it appeared that the track walker was killed by a train, striking him from behind, though the train could have been *seen* when 2200 feet away. It also appeared that the train was operated in the *usual manner.* The Court said on page 188 and 189 of the opinion:

"There was no violation of a statutory requirement, nor was there failure of compliance with *any orders or recognized custom* or rule adopted for the safety and protection of employees * * * * nor could it be held that since in order to constitute negligence, such conduct must be regarded as unusual and consequently not assumed, though it has been held that a railroad track walker * * * * * * assumes the risk of being struck by trains *properly or ordinarily operated.*" (Italics ours)

Thus it is that the foundation of the doctrine of Chesapeake & Ohio v. Nixon is that the track walker through his own faculty of vision or that of his companion (Connelley v. Pennsylvania R. R. Co., supra) may protect himself much easier *under ordinary conditions* than may the engineer protect him. That all the track walker has to do, knowing the danger, is to exercise his faculties and step off the track. Such a risk he properly assumes under *ordinary operating conditions.*

These underlying reasons have been recognized in cases which have followed and limited the Nixon case, both in the Federal Courts and in the Court of Appeals of the State of New York.

Thus in *Norfolk & Western v. Kratzer*, 37 Fed. Rep. 2d Series 522, 6th Circuit, January 1930, Circuit Judge Hicks

in holding a railroad not liable for injuries to the plaintiff, an engine tender who was on the tracks looking for pieces of wooden blocks to put under the drive wheel of his engine, then on a "wye", was run down by a train with electric headlights burning brightly, running 15 miles an hour *"and presumably on schedule."* The engineer and fireman were watching the block signal and did not see the plaintiff. The Court said:

"The *track was straight;* the night was *clear* and *still;* there was nothing to interfere with *plaintiff's vision* and *hearing.* There is *no evidence of any custom to warn or any manner by which warning might have been given."* Under such circumstances, defendant was entitled to expect that plaintiff protect himself. Chesapeake & Ohio v. Nixon, etc. (Italics ours)

In Wyatt v. N. Y. Ont. & Western, 45 Fed. 2d Series, 705, 2d Circuit, December 1930, (certiorari denied 283 U. S. 829) it appeared that a brakeman was out on the track gathering coal for a dug-out fire. Here he was run down by a train backing up without warning. It appeared that there was a rule to sound *the customary* warning by the yard engine when it was about to back down. Circuit Judge Swan said:

"Defendant owed plaintiff same duty of care as though he were directly engaged in moving its cars; and a failure to sound the *customary* signal required by the *rule* was a violation of that duty. It is urged that he voluntarily placed himself in a position of danger with full knowledge that the engine would shortly back down upon track 5, and therefore, was obliged to rely upon his own watchfulness to keep out of its way. *Aerkfetz v. Humphreys,* 145 U. S. 418; Chesapeake & Ohio v. Nixon, 271 U. S. 218; Toledo, St. Louis R. R. Co. v. Allen, 276 U. S. 165. But this Court is committed to the doctrine *that those decisions are inapplicable when the railroad violated its own rule requiring the ringing of the engine bell when the engine is about to move."* (Italics ours)

In Carfello v. D. L. & W. R. R., 54 Fed 2d Series, 475, December 1931, (C. C. A. 2d Circuit), it appeared that a

section man was injured in using a path along the railroad which crossed the track. He was injured by a train. The Court follows the Nixon case, saying:

"So the problem simmers down to whether or not a section man, working on the track of his employer at the point where a known path, used by all who will, crosses that track is entitled to be looked out for or warned of the presence of such engines or trains moving toward him as the employer runs along the track. *As no custom to give any warning to section men at this place was shown* the rights and duties of these parties are controlled by the law as laid down in the case of Chesapeake & Ohio v. Nixon." (Italics ours)

The law declared by the Court of Appeals in another case recognizes that the principles applied in both jurisdictions are the same.

In Fiero v. New York Central R. R., 256 N. Y. 446, (1931), that Court wrote:

"The decisions of the courts of this state as well as those of the federal courts preclude any possibility of affirming this judgment. As early as Chrystal v. Troy & Boston R. Co., 105 N. Y. 164, was formulated a rule that a locomotive engineer, seeing a *person on the track at a time when his train is perfectly visible*, may assume that such person will leave the track in time to escape injury, and *without imputation of negligence, may continue his run until he discovers that the person is heedless of danger.* This rule was repeated and even more strictly applied in O'Brien v. Erie R. Co., 210 N. Y. 96, where we held that an engineer has the right to assume that one whom *he sees* on the track repairing it will leave it in time to escape injury, and that a jury may not infer negligence from the engineer's failure to keep a vigilant outlook, to sound a warning, or to slow down his train when rounding a curve at a speed of fifty miles an hour. Of course, *when violation of a rule or custom* is shown, as in Blanchard v. Delaware, L. & W. R. Co., 211 N. Y. 79, or when there has been an omission by the employer to *establish a suitable system of warning*, the law is

necessarily different, but, in instances where such proof is absent, the doctrine of the Supreme Court is the same as that within our own jurisdiction. Chesapeake & Ohio R. Co., v. Mihas, 280 U. S. 102. *Here there is no evidence that any rule or custom was violated.*" (Italics ours)

But in this case at bar (Rocco v. Lehigh Valley 259 N. Y. 51) when it was before the Court of Appeals, that court wrote on this subject the following only:

"The duty to watch alertly for trains rested on the deceased (Chesapeake & Ohio v. Nixon, 271 U. S. 218)"

We submit, with the utmost respect for our own High Court, that this general statement is error for it implies on the authority of the Nixon case that there is no duty under the special circumstances of this case, on the part of the defendant, to warn Rocco. It fails to give any consideration to the facts and circumstances, necessarily found by the jury, which imposed a duty upon the motorman owing to Rocco to warn. It assumes that the general statements, of the Nixon case have no qualifications, limitations or exceptions within which Rocco could clearly come. The utmost discharge by Rocco of the undoubted duty to "*watch* alertly" for the train, would not have enabled him to *see* around the blind curve in time to save his life.

Moreover, the unique circumstances of this case, proven and accepted by the jury and the Appellate Division, take it out of the doctrine of the Nixon case on several grounds, which, we hope, we have demonstrated.

POINT IV.

Rocco's negligence, if any, was "contributory" and "concurrent" but not "primary" and not within the doctrine of Davis v. Kennedy and Unadilla Valley v. Caldine.

A. Construction in Supreme Court

Frese v. Burlington & Q. R. R., 263 U. S. 1, Davis v. Ken-

nedy, 266 U. S. 147, and Unadilla Valley v. Caldine, 278 U. S. 139, are the cases out of which has arisen a doctrine which we may call that of "primary" and "secondary" negligence. We maintain that the doctrine has no application to the case at bar. But the Court of Appeals in its opinion in the case at bar founded its decision, in part, on Davis v. Kennedy and Unadilla Valley v. Caldine, holding that the "violation of the rule was the *primary* cause of the accident." It therefore becomes necessary to examine the doctrine of those cases (the Frese case, the Davis v. Kennedy case and the Caldine case) in order to determine the application and extent of the doctrine. And for the sake of brevity, we will refer to the doctrine as the "Caldine doctrine" after the last case in the series in this Court.

1. In each of the three cases above mentioned there was a collision between two trains which we will call train "A" and train "B".

2. In none of the three cases was there any negligence claimed as to any employee operating train "B". In two of the cases train "B" was operated by the same owner as train "A", but in the Frese case which involved a collision between two trains at a point where one railroad crossed the other, train "B" was owned by a separate railroad.

3. In all three cases the negligence claimed under the Federal Employers' Liability Act was that of a fellow-employee of the plaintiff who either *participated* in or bore a *direct relation* to the negligent movement of train "A". This participation might be on the part of a fireman or brakeman or conductor or it might be on the part of a station agent who had a direct relation to the movement as in the Caldine case.

On account of this *participation* and *direct relation* to the negligent movement of train "A", the employee who had personal physical control or equal control was held guilty of "primary" negligence and the employee who *participated* by not *preventing* the movement or who was *related* to the

movement in a lesser degree was held guilty of "secondary" negligence.

4. The doctrine is authority for the proposition that one guilty of "primary negligence" cannot recover from the common employer (even under the Federal Employers' Liability Act) on the basis of the "secondary negligence" of his co-employee. The reason for the rule is stated in the Frese case in the following language:

"It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to failure to act as required on the ground that possibly it might have been prevented if those in *secondary relation to the movement* had done more." (Italics ours)

It is at once apparent that the "Caldine doctrine" as laid down by this Court in these three cases has no application to a case where the negligence claimed by the plaintiff as the basis of his recovery is that of the operator of train "B" as it is in the case at bar. For there is lacking in the case at bar both "participation" and "relation" to the same "movement." Rocco's negligence, if any, related to his moving the speeder against a general instruction about first inquiring the "line up." The speeder takes the place of train "A". There is no one in "secondary" relation to that movement of the speeder or that negligent act against whom negligence is claimed.

Rocco's act is "independent" of any negligent act of the motorman. The motorman of train "B" in what he did in controlling the movement of train "B" was also acting independently of any act of Rocco's. He had control of an independent instrumentality of movement. His negligence was separate and distinct and could have no "secondary" relationship to Rocco's negligence, if any. There was no "participation" in the same act of negligence or the same "movement."

Participation in the same accident will not fulfill the requirements of the doctrine, for the accident, as here, may be the result of several independent and concurrent acts of

negligence, which the jury compares and finds damages in proportion as the component acts of negligence bear to the whole damage.

"Primary" and "secondary" negligence as used in the Caldine doctrine properly refers to the relationship of two employees to the same "component" or movement.

We earnestly believe that the Supreme Court should so define the doctrine and that in any event the Court of Appeals was in error in applying the Caldine doctrine to the case at bar.

B. *Have the lower Federal Courts extended or defined the limits of the doctrine, contrariwise to the limits inherent in the three Supreme Court cases above? We think not.*

1. First in importance and lucidity we note: Miller v. Central Railroad of New Jersey, 58 F. (2d), 635, Certiorari denied 53 Sup. Ct. Rep. 18, 1932. This case is a true typical "primary" and "secondary" negligence case. There was involved a train "B", but no one on train "B" was involved in the charged negligence.

But, all the three cases in the Supreme Court the "primary" wrongdoer violated a specific order, devised for a specific occasion. In the Miller case, is laid down the rule that where the decedent or injured plaintiff (who would otherwise be guilty of "primary" negligence) has violated a rule "generally enjoining caution or responsibility" as distinguished from "specific precaution for specific occasions", then the negligent act involved in such violation is one of two "concurring acts of contributory negligence" and not "primary" negligence. (This applies to Rocco's negligence, if any, as brought out in the next point.)

2. *Slocum v. Erie R. R. Co.*, 37 Fed. (2d) 43, and *Bradley v. Northwestern Pacific*, 44 Fed. (2d) 684, were true typical "primary" and "secondary" negligence cases. They require no further comment.

3. *Southern Railway v. Hylton*, 37 Fed. (2d) 843, was a

case of dismissal because the alleged negligence of another servant was not proven at all. This case is of a type with *Great Northern v. Wiles*, 240 U. S. 444. There was no negligence in the case except the plaintiff's. The Caldine doctrine is therefore entirely inapplicable.

4. In *Reynolds v. Ont. & Western*, 42 Fed. (2d) 164, it appeared that a backing train collided with a speed car and injured Reynolds who was on the speed car with his back to the colliding train. Eastwood, his mate on the speed car, was occupied tinkering with the motor. The negligence claimed was that of Eastwood, the mate of Reynolds, in not keeping a look out ahead *and* that of the flagman of the backing train who failed to go back to warn or protect the rear of the train. It will be noted that as to the negligence of Eastwood, the mate of the plaintiff on the speeder, the Court considered, properly we think, that the Caldine doctrine did apply. The Court said in this connection:

"The question whether intestate's neglect, if under duty to act, was the primary cause of the collision may involve difficult considerations of law and fact, which we do not pass upon on the present record."

As to the negligence charged against the trainman who did not "protect" the backing train (the equivalent of train "B" of our type and the equivalent of the motorman of the passenger train in the Rocco case) neither the Court nor the counsel attempted to apply the Caldine doctrine. If the Caldine doctrine had been applied to the negligence of the flagman of the backing train (train "B"), then this case would have furnished a precedent for what the Court of Appeals said in the Rocco case. But in the Reynolds case the Circuit Court of Appeals of the Second Circuit properly applied the Caldine doctrine to the two employees on the speeder and properly failed to apply the Caldine doctrine to the employee on train "B". As to the duties owing between employee of train "B" and the speeder the Court applied Chesapeake & Ohio v. Nixon, i. e., that under ordinary circumstances there is no duty on the part of the train to look

out for a hand car. This doctrine is treated elsewhere in this brief.

The same Court which decided the Reynolds case in 1930, criticized the Reynolds case in 1932 in the Miller case, supra, but not in respect to the application of the doctrine of the Caldine case to this particular state of facts.

5. Paster v. Pa. R. R., 43 Fed. (2d) 908 has only the appearance of a departure from the Caldine doctrine. There a standing car on which Paster was working (which we will call train "A") was backed into by a string of cars (which we will call train "B"). Paster was injured. The claimed negligence was the neglect of an employee called Sullivan who allowed the movement of train "B" after he had promised plaintiff to prevent this. Sullivan is therefore related to the movement in a secondary way within the Caldine doctrine. He was a "participant" just as was the station agent in the Caldine case. We do not think the case a departure from or an extension to the Caldine doctrine as defined in this Court.

6. Erie R. R. Co. v. Irons, 48 Fed. (2d) 60 involved no collision and is not a typical "primary" and "secondary" case and was not treated by the Court as such; in fact the Court confirmed the refusal of the Trial Court to direct a verdict for the defendant based on Davis v. Kennedy holding that such a course, the Court said, would be inconsistent with submitting the issue of defendant's negligence to the jury. It will be seen then that the attempted application of the Caldine doctrine in the Irons case was refused.

7. In the Dibble case, 31 Fed. (2d) 239, (Writ denied 280 U. S. 565), Dibble, the motorman, imputed negligence to Caldine, the conductor, on the same accident involved in the Caldine case. Caldine, in the Caldine case, charged negligence to Dibble, and the Court held that as to the employer each, in his separate case, was guilty of "primary" negligence. The inherent elements had not changed in anywise.

C. *The Court of Appeals was in error in applying the Caldine doctrine to the case at Bar.*

To apply the Caldine doctrine to the Rocco case is entirely unwarranted on the facts as a matter of law, because in the case at Bar there is lacking the essential elements of "participation" and "relation to the negligent act". Rocco was contributorily negligent or he was not. There is no one "secondarily" liable. The motorman of train "B" was either negligent for an independent act of his own, which contributed to the accident or he was not.

As a matter of law then the case was properly submitted to the jury and no warrant exists as a matter of law on this score to take the case from the jury's consideration.

To apply the Caldine doctrine to this case, would be to empty the Federal Employers' Liability Act of its meaning. See Hadley v. Union Pacific R. R., 246 U. S. 330. That act is to be liberally construed. See Jamison v. Encarnacion 281 U. S. 635.

D. Even if the Caldine doctrine were otherwise applicable Rocco's negligence, if any, was "contributory" and not "primary" for the reason pointed out in the Miller case which is treated in the next point.

POINT V.

Decedent had a positive duty to inspect and repair during certain hours regardless of late trains; especially dominating was this duty on December 8, 1927, on account of washout conditions.

General ORAL instructions to decedent to inquire, before going out on the line, (twice a day before 6:30 a. m. and before 3:30 p. m.), **as to the location of trains enjoined a general caution, the violation of which might be contributory negligence; but such oral instructions did not constitute a specific precaution, for a specific occasion, the violation of which might constitute an assumption of risk as a matter of law.**

A. The evidence in the light of the jury's verdict fairly establishes

(a). That the instruction had been given for 6 years to track inspectors, but had not been promulgated in the Rule Book.

(b). That the instruction was general, and not for any specific train.

(c). That the instruction was not rigid but was "lived up to in a certain respect." (R. 128).

(d). That the inquiry was usually made orally before leaving Ithaca at 6:30 a. m. and 3:30 p. m. but the information could be acquired from other employees who had it. (R. 129, 130).

(e). That generally through Rocco's section there were but two passenger trains each day (four passages) and a freight train down and back three times a week, Tuesday, Thursday and Saturday (R. 21) and a pick-up train to Ludlowville and back (R. 33, 34). The accident happened on a Thursday.

(f). The day previous to the accident, the wind had been blowing hard, piling the water up towards the track (R. 61).

Day of the Accident.

(g). The day of the accident, a wreck train containing decedent's son had gone out early to repair washouts (R. 34).

(h). The freight train from Auburn did not get through (R. 158).

(i). The passenger train from Auburn had no schedule that day (R. 104). The train dispatcher could tell only what station it passed but not when it would reach the next station (R. 104).

(j). The telegraph operator at Ithaca did not call the train dispatcher for information about trains that day (R. 158, 159).

(k). Rocco did not ask telegraph operator at Ithaca for information that afternoon (R. 122).

(l). The knowledge of conditions along the line with the wreck or work train out with Rocco's son on it, and the passenger train not in at noon, were known to the employees and presumably to Rocco (R. 129, 130). He had made his morning tour.

Rocco's Duty.

Rocco, exercising his judgment, may have considered it unnecessary and superfluous to make inquiries in view of what he knew of conditions. He was facing no prohibition against going out. The fact is just the contrary. He had to go out under all conditions.

(m). Rocco was bound to go out "on his usual time" (R. 99) whether the trains ran on schedule or not (R. 100).

(n). These very conditions of the track that day were the reason he was put there to patrol and inspect and repair (R. 99, 108).

(o). Perhaps there was some negligence in not walking over to the station to make superfluous inquiries (as it may have seemed to him that day) but he was a faithful worker of twenty years' experience on this line and he knew his calling and his duty. He went where his work was.

The jury has measured his negligence on the "comparative rule," and apportioned the damage. The question here, is, was his negligence merely contributory, or was it such a sole proximate cause as to preclude any recovery, *as a matter of law.*

B. We regard a recent decision as disposing of this branch of the case. We refer to Miller v. Central R. R. of N. J. 58 Fed. 2d Series, 635, (C. C. A. 2—May 1932) Certiorari denied 53 Sup. Ct. Rep. 18., in which it appeared that a "work extra" engineer, obeying conductor's order to proceed to next station, *without receiving a copy of running order,* collided with a freight train. The question was whether the violation by the decedent of the rule relative to an engineer remaining responsible for the safety of his train, was contributory merely or rendered him "primarily" responsible as a matter of law.

The Court said: "We assume for argument that he was negligent in this last respect, and that except for the statute the plaintiff could not recover. But it seems to us that the situation involved two *concurring acts of contributory negligence,* and was not one where the employee has disobeyed a rule and is "primarily" responsible. Frese v. Chicago B. & O. R. Co., 263 U. S. 1, Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, Unadilla Valley R. Co. v. Dibble, 31 F. 2d Series 239, (C. C. A. 2), Certiorari denied 280 U. S. 565, Bradley v. Northwestern Pac. R. Co. (C. C. A. 9), 44 F. 2d Series 683. All these decisions involved *specific precautions for specific occasions;* the stopping of a train at a given

spot until another passed, or until the track was clear. No doubt the doctrine is not confined to train movements, (Paster v. Pa. R. R. 43 F. 2d Series 908), but it does not seem to us to extend to rules *generally enjoining caution, or responsibility,*—in spite of some of our language looking to the contrary in Reynolds v. New York O. & W. R. Co. 42 F. 2d Series 164. If it did, an employer could revive the defense of contributory negligence by imposing as an affirmative duty such care as is appropriate to the situation, which is just what the common law made a condition upon recovery. The statute was designed to end that defense and cannot be so conveniently avoided; the doctrine does not, in our judgment, apply except when *more definite commands* are given to *meet more definite situations;* how definite we need not decide. * * * * Thus we think the situation at bar was the usual one of contributory negligence only." (Italics ours).

POINT VI.

Decedent did not assume the risk as a matter of law.

A. *As to plaintiff's negligence.*

We have shown above that decedent did not "assume the risk" as a matter of law within the doctrine of Chesapeake & Ohio v. Nixon, because that class of cases is inapplicable, on assumption of risk, as a matter of law, where there is a rule or custom or an extraordinary danger from defendant's negligence not normally incident to the employment.

Norfolk & Western v. Kratzer, supra
Wyatt v. New York, Ont. & W. R. R., supra
Carfelo v. D. L. & W. R. R., supra.

Such negligence, if found, was independent and contributory only. It was for the jury to measure its extent.

Miller v. Central R. R. of New Jersey, supra.

B. *As to Defendant's negligence.*

Decedent assumed only the ordinary risk and not the extraordinary risk of the extraordinary operation as to speed without warning under all the conditions.

Chesapeake & Ohio v. Proffett, supra

New York Central R. R. v. Marcone, supra

Kreigh v. Westinghouse, C. K. & Co., supra.

C. *Risks not assumed without awareness.*

The burden of proof that the decedent assumed any particular risk was on the defendant and the defendant cannot sustain the burden without showing, what is not shown here, that the decedent *was made aware* of the dangerous speed and the lack of a commensurate warning *before* he can be held to have assumed the risk thereof.

In Chesapeake & Ohio v. De Atley, 241 U. S. 310, the Court said:

> "The plaintiff had the right to presume that the engineer would exercise reasonable care for his safety and cannot be held to have *assumed the risk* attributable to the operation of the train at an unusually high and dangerous rate of speed, *until made aware of the danger,* unless the speed and the consequent danger were *so obvious* that an ordinary careful person in this situation would have observed the one and appreciated the other."

In Director General of Railways v. Templin, 268 Fed. 483, discussing the law of extraordinary dangers, the Court said:

> "In this case we think *no one but the jury* could say whether Templin, in assuming that his employer would protect him by the customary warning in the circumstances, *saw or should have seen,* the *extraordinary danger arising from his employer's negligence in not giving the warning,* and whether, accordingly, Templin did or did not assume the risk thereof." (Italics ours)

Conclusion.

For the reasons assigned in the Petition for the Writ of Certiorari and because of the facts and the law set out in the Brief accompanying said Petition and in this Brief on the Merits on the Writ, we respectfully submit that after full consideration by this Court, the judgment and decision of the Court of Appeals of New York herein should be reversed and the judgment of the Trial Court be reinstated.

Respectfully submitted.

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